

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

TOPGALLANT LINES, INC.

Debtor

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Chapter 7 Case

Number 89-41996

ORDER

The Trustee filed a Motion to Amend the attorney employment order on January 5, 1993, seeking approval in future applications for compensation of the attorney for the Trustee on a contingent fee basis of thirty-three and one-third percent (33⅓%) of all recovery plus expenses. James L. Drake, Jr., was appointed by order of this court dated February 19, 1991, to serve as attorney for the Trustee. However, that order set forth no specific terms of employment with respect to compensation. The Trustee has previously sought compensation for services of his attorney at a rate of \$100.00 per hour. Previous applications were approved in March and December, 1992, and January, 1993 at a rate of \$100.00 per hour. Taking all interim applications into account Mr. Drake as attorney for the Trustee has been compensated in the total amount of \$33,113.36.¹

¹ This amount does not include fees awarded other attorneys representing the estate or other professionals.

The Motion to Amend as filed in court proposed that the method of compensation of the attorney for the Trustee be changed from the hourly rate allowed on previous applications. However, there was no order at the inception of Trustee's counsel's employment establishing any particular method of compensation. The court's prior order stated that compensation was "to be later fixed and determined by the court in such manner as the court may from time to time direct." *See* order dated February 19, 1991. 11 U.S.C. Section 328(a) provides in relevant part:

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

Based on the statutory language the United States Trustee argues that the court may not allow compensation on different terms and conditions than those approved at the inception of employment until "after the conclusion of such employment" and then only if the terms and conditions prove to have been improvident. That objection is shared by counsel for Southeastern Maritime Company, a creditor in the case. However, the purpose and nature of interim compensation is to avoid economic hardships. Matter of Evangeline Refining

Co., 890 F.2d 1312, 1321 (5th Cir. 1989). Such economic hardship is evident in this case where litigation has continued for over two years since the case was converted to a Chapter 7 and where the trustee has few if any unencumbered assets which might provide an avenue of compensation. *See* court's order of December 23, 1993, interpreting Section 552(b) to allow payment of the Trustee's fees and expenses from post-petition proceeds of secured collateral.

According to the Fifth Circuit in Evangeline, interim fee awards are interlocutory and usually require future adjustment during the pendency of the bankruptcy case. *Id.* at 1321. *See also In re Callister*, 673 F.2d 305, 306 (10th Cir. 1982). The court in approving subsequent applications for compensation is not limited by any prior orders on interim compensation. However, the court may consider the interim awards in making a final award. *Id.* at 306. As a result I hold that the language of Section 328 does not limit the court's discretion in altering terms of employment on interim applications.

Furthermore, no hourly rate of compensation was fixed when Mr. Drake was authorized to act as counsel to the Trustee. While he has previously filed fee applications seeking hourly compensation that fact alone does not irrevocably constitute the hourly rate as a "reasonable term and condition of employment," especially when no such terms were established by my original order. This case differs from In re Benassi, 72 B.R. 44 (D. Minn. 1987), in which the bankruptcy court by order specifically approved employment of attorneys on a contingency fee basis, and later limited the fees using the criteria set forth in

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and In re First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1977). The bankruptcy court determined that the contingency fees would provide the attorneys with much greater compensation than the reasonable value of their services and concluded that the previously approved contingent agreement was "improvident" under Section 328. 72 B.R. at 46. The district court reversed.

The district court noted that the bankruptcy judge had specifically approved the contingency fee arrangement. Further, the court noted that the bankruptcy judge in his findings of fact made no finding that the representation was disappointing or inadequate or that the dispute was resolved at an unexpectedly early stage of the proceedings. 72 B.R. at 48. The court concluded that the bankruptcy judge abused his discretion by disregarding the contingency fee arrangement and limiting the attorneys to reasonable fees without proper justification. The district court concluded that the settlement reached prior to trial could have been expected in the type of case involved, a condemnation suit, and that the "reasonable fee" analysis was improper in light of the prior order allowing the contingency fees. Id. at 49. *See also* In re Reimers, 972 F.2d 1127 (9th Cir. 1992).

Benassi is similar to In re Confections by Sandra, Inc., 83 B.R. 729 (9th Cir. BAP 1987), in which the appellate panel for the Ninth Circuit reversed a bankruptcy judge that altered a prior fee arrangement without proper justification. In Confections by Sandra, Inc., the appellate panel for recognized that Section 328(a) anticipates that the terms of the

fee arrangement will be established prior to the rendition of professional services. In that case the court reversed the decision of the bankruptcy judge notwithstanding the substantial discretion granted the court in altering fee arrangements because it found no evidence of any developments that justified alteration of the fee arrangement. Because the bankruptcy court had relied upon the concept of conservation of the estate to unsecured creditors which is an impermissible factor for awarding fees under Sections 328 and 330, the court found that a reduction in the fee arrangement established at the inception of the case was inappropriate. In neither case, however, was it decided that a bankruptcy court cannot alter a method of compensation prior to the final application.

However, I cannot agree with the Trustee that if the \$100.00 hourly rate is deemed to be a determined condition of his original employment, those conditions have been proven to be improvident in light of subsequent developments. Despite the fact that the Trustee reasonably believed at the inception of his employment that there were approximately \$100,000.00 of unencumbered funds from which administrative expenses including professional fees could be paid and later learned that that belief was not well founded, substantial fees have been awarded to the Trustee on an hourly basis. Much of the work for which these fees were awarded were necessary to the administration of the estate, but it is unknown what purely monetary benefit they will have. Nevertheless, the fees are allowed, even if not paid as yet. Now the Trustee is pursuing over 400 adversary proceedings seeking monetary recovery of over \$10 million, much if not all of which will be unencumbered. On these facts there is as yet no basis for finding hourly compensation

to have been improvident.

Should circumstances change, however, this determination can be revisited upon subsequent interim or final application. At any such hearing the Trustee will be required to establish the nature of services rendered, the time devoted to each service rendered, and the reasonableness of the fee giving due consideration to the lodestar rate as it now exists or hereafter is established in this District, together with an appropriate increase to compensate the Trustee for the contingent nature of his fee recovery, if any. All requirements as to documentation as well as the legal standard for review applicable to hourly fee applications by Trustees and their counsel will be applicable in such hearing. The Trustee is required in all future applications to delineate the services rendered by category or subject-matter of services rendered throughout the case and to show the monetary recovery, if any, for the estate resulting from such services, or in the absence of a recovery, the necessity of such services in the administration of the estate. Because Trustee's counsel has previously been awarded compensation for services on an hourly basis without regard to the amounts recovered, the extent of all fee awards must be considered in evaluating the reasonableness of any fee allowance, contingent or otherwise, in the future.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1993.